UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT KENNEY, individually and on behalf of all others similarly situated, Plaintiff/Appellee, v. HELIX TCS, INC., Defendant/Appellant.	No. 18-1105 (D.C. No. 1:17-CV-01755-CMA-KMT) (D. Colo.)

APPELLANT'S PETITION FOR REHEARING EN BANC

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Rehearing *en banc* is requested.

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Appellant, Helix TCS, Inc., by and through undersigned counsel, respectfully petitions the Court for a rehearing *en banc*, and in support thereof states as follows:

STATEMENT REGARDING BASIS FOR REHEARING EN BANC

The Panel's Publish Opinion holds that individuals have a private property interest in the proceeds of federal drug crimes and that a federal court may award them compensation out of those proceeds for their efforts in trafficking Schedule 1 drugs. Although arising out of Colorado's recreational marijuana industry, the Panel's decision confers the same rights on a mule trafficking methamphetamine for a cartel in Oklahoma as it does on a driver ferrying marijuana through the streets of Denver on behalf of a state-licensed marijuana company. Any effort to cabin the Panel's Opinion to only those trafficking marijuana in Colorado—which limitation cannot be found in the Opinion itself—would lead to unequal application and enforcement of federal employment law in this Circuit based solely on the drug policy choices of the several states. The only way to ensure uniform application of federal law in this Circuit that comports with clearly expressed congressional intent is for this Court to hold *en banc* that the Fair Labor Standards Act ("FLSA") does not

guarantee minimum compensation for those whose employment conduct constitutes a federal drug crime.

The Panel's Opinion imposes an unworkable standard on courts throughout this Circuit, decimates the uniform application of the Controlled Substances Act and FLSA between states in this Circuit, undermines Congress's consistently expressed policy of inhibiting commercial transactions in Schedule 1 drugs, and contradicts the United States Supreme Court's decisions in, *e.g.*, *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 627 (1989), *Luis v. United States*, 136 S. Ct. 1083, 1091–92 (2016) and this Court's decisions in, *e.g.*, *United States v. Nichols*, 841 F.2d 1485, 1489 (10th Cir. 1988), and *United States v. Gordon*, 710 F.3d 1124, 1135 n.13 (10th Cir. 2013), all of which hold that individuals have no right to enjoy the fruits of their drug-trafficking activity.

Limiting application of the Opinion to Colorado's recreational marijuana industry would contravene decisions of the United States Supreme Court and this Court requiring that federally declared standards are not to be defeated by giving the states a final say as to their applicability. *See*, *e.g.*, *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 361

(1952) (uniform application of Federal Employers' Liability Act); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245-46 (1942) (uniform application of the Jones Act); *Hernandez v. Commissioner*, 490 U.S. 680 (1989) (uniform application of the tax laws); *United States v. Lee*, 455 U.S. 252 (1982) (uniform application of Social Security Act); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (uniform Sunday closing laws); *Reynolds v. United States*, 98 U.S. 145, 166-167 (1878) (uniform criminal prohibition on polygamy); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1141 (10th Cir. 2013) (uniform application of labor laws), *aff'd sub nom*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

Rehearing *en banc* is necessary to secure and maintain uniformity in the Court's decisions.

In addition to conflicting with decisions by the Supreme Court and this Circuit, the issues presented in this case are exceptionally important because they will define the relationship between federal law and the growing number of state statutes legalizing and regulating marijuana. Specifically, the exceptionally important issues in this matter include the following:

1) whether an individual engaged in trafficking a Schedule 1 drug may avail himself of federal benefits for such trafficking in contravention of forfeiture by federal statute;

2) whether the Fair Labor Standards Act ("FLSA"), 29 U.S.C §§ 201-219, and the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq*., must be uniformly applied regardless of the legal status of marijuana in the state in which they are applied; and,

3) whether drug traffickers in any state are "employees" within the meaning of the FLSA.

PROCEDURAL BACKGROUND REGARDING PETITION FOR REHEARING *EN BANC*

1. On January 15, 2018, Appellant filed its Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) and Rule 5 of the Federal Rules of Appellate Procedure (the "Petition for Permission to Appeal").

2. March 12, 2018, this Court granted Appellant's Petition for Permission to Appeal

3. May 29, 2018, Appellant filed Appellant's Opening Brief.

4. On July 19, 2018, Appellee filed Appellee Robert Kenney's Response Brief.

5. Appellant submitted Appellant's Reply Brief on August 16, 2018.

6. In its Publish Opinion on September 20, 2019, a Panel of this Court affirmed the district court's denial of Appellant's Motion to Dismiss in the District of Colorado.

GROUNDS FOR PETITION FOR REHEARING EN BANC

This request for *en banc* consideration seeks to focus this Court on a panel decision that contradicts both Supreme Court precedent and law firmly established by this Circuit. First, the United States Supreme Court has consistently interpreted federal forfeiture statutes to preclude property rights in proceeds from activities prohibited by the CSA. This Circuit has heretofore faithfully followed those binding decisions. Second, decisions of the Supreme Court and this Circuit require the uniform application of federal law, which application *must* not depend on the decisions of state legislatures as they act in contravention of federal statutes. The Panel decision has compromised the clarity of prior decisions and undermined congressional intent by holding that

individuals trafficking marijuana in Colorado are "employees" under FLSA and have a private right of action in federal court to obtain federally prescribed wages for conduct that necessarily violates the CSA.

I. The Panel's Opinion Vests in Criminals a Personal Property Right to the Proceeds of their Illicit Conduct.

Nothing in the Panel's Opinion limits its application to participants in Colorado's state-legal marijuana industry. To the contrary, the Panel emphasized "the 'striking breadth' of the FLSA's definition of employee, which is purposefully expansive to maximize the full reach of the Act[.]" [Op. at 8 *quoting Baker v. Flint Engineering & Const. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998)]. Thus, the Panel reasoned, unless a plaintiff fits within one of the "categories of employees that are explicitly exempted from FLSA protections," they are covered under the Act. [Op. at 4]. Because the plaintiff here—an individual who transports marijuana and drug proceeds while armed with a firearm—is not expressly exempted from FLSA's definition of "employee," he may sue in federal court and recover "the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be[.]" 29 U.S.C. § 216(b).

This reasoning applies with equal force to anyone performing labor for an organization engaged in drug trafficking—or any other federally illegal conduct. FLSA does not expressly exempt from its definition of "employee" those performing labor for cartels trafficking any Schedule 1 substance, nor for employees of human traffickers, nor for those trafficking illegal firearms. But Congress cannot have intended a private property right in overtime pay to vest in paid laborers of criminal enterprises. To the contrary, the Supreme Court has held that title to those illicit gains vest in the United States upon commission of the crime. *Caplin & Drysdale, Chartered*, 491 U.S. at 627; *Luis*, 136 S. Ct. at 1091–92. Drug traffickers cannot have a private right of action for overtime pay—cannot state a claim under FLSA for "their" unpaid wages—because the proceeds of their conduct are not theirs; ownership vests in the United States. *Nichols*, 841 F.2d at 1489; *Gordon*, 710 F.3d at 1135 n.13.

The Panel's Opinion contradicts decisions so holding, and thereby promotes drug trafficking and other federally illegal conduct in contravention of Congress's express intent. *Caplin & Drysdale,*

Chartered, 491 U.S. at 627; *Luis*, 136 S. Ct. at 1091–92; *Nichols*, 841 F.2d at 1489; *Gordon*, 710 F.3d at 1135 n.13.

II. The Panel's Order Requires Different Results in Different States and Precludes the Uniform Application of Federal Law to Different States in this Circuit.

Based on the Panel's Opinion, a marijuana dealer in Wyoming can now file suit in the United States District Court for the District of Wyoming and demand payment of federally mandated wages. Any attempt to limit application of the Opinion to similarly situated dealers in Colorado would itself be problematic, undermining the uniform application of FLSA between states in this Circuit that have legalized marijuana and those that have not. This cannot be. Congress enacts law in a particular area because of the need for uniform legislation throughout the United States. *See*, e.g. *Dice*, 342 U.S. at 361; *Garrett*, 317 U.S. at 245-46. Applying the Panel's decision in a reasonable way—by limiting its reach to employees of Colorado's state-legal marijuana industry—requires unequal interpretation and enforcement of FLSA in the states of this Circuit.

The Panel's Opinion is unworkable. Either it creates a federally vindicable property interest in the proceeds of federal drug crimes in

direct contravention of congressional intent and Supreme Court precedent or it requires unequal application of federal employment law in this Circuit depending on the marijuana policy of each state. *En banc* review is necessary to hold that an individual perpetrating a federal drug crime is not entitled to federally mandated compensation.

WHEREFORE, Appellant respectfully requests a rehearing *en banc*.

Dated: October 7, 2019.

Respectfully submitted

ALLEN VELLONE WOLF HELFRICH & FACTOR P.C.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)

This Motion complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because the Motion contains 1532 words, excluding the parts of the Motion exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

This Motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point-size Times Roman font.

CERTIFICATE OF HARD COPY SUBMISSION

The undersigned hereby certifies the hard copies of this Petition submitted to the Court are exact copies of the version submitted electronically.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing

(1) All required privacy redactions have been made;

(2) If required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, VIPRE Business AntiVirus Software, Version 6.2.5530.0 which is updated daily, and according to the program are free of viruses.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October 2019, I electronically filed the foregoing using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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In addition, I hereby certify that that on the 7th day of October, 2019 hand delivered 6 copies of the Petition for Rehearing *En Banc* to the Clerk of this Court.

s/ Teresa Silcox
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